1992

Allstate Insurance Company v. Liberty Mutual Insurance Group : Brief of Appellee

Utah Court of Appeals

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DOCKET NO. 920646 IN THE UTAH COURT OF APPEALS

ALLSTATE INSURANCE COMPANY, Plaintiff and Appellant, v. LIBERTY MUTUAL INSURANCE GROUP, Defendant and Appellee.	:	Case No. 920646-CA Priority 16

BRIEF OF APPELLEE

Appeal from Order of Third District Court, Salt Lake County, State of Utah, Honorable John A. Rokich, District Judge

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DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES

There are none.

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PARTIES TO THE PROCEEDING BELOW

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Liberty Mutual Insurance Group, defendant and appellee

Represented by Royal I. Hansen and Jeffrey Robinson

Travelers Insurance Company, defendant

Represented by Paul S. Felt and John A. Adams

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

Treatises

IN THE UTAH COURT OF APPEALS

ALLSTATE INSURANCE COMPANY, Plaintiff and Appellant, v. LIBERTY MUTUAL INSURANCE GROUP, Defendant and Appellee.	:	Case No. 920646-CA Priority 16

JURISDICTION

This is an appeal from a final order pursuant to Rule 3 of the Utah Rules of Appellate Procedure. The Court of Appeals has jurisdiction pursuant to Utah Code Ann. § 78-2-2(3)(j), as amended.

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

Did the trial court err in granting Liberty Mutual Insurance Group's ("Liberty") Motion for Summary Judgment and denying Allstate Insurance Company's ("Allstate") Cross-Motion for Summary Judgment?

STANDARD OF REVIEW

"Because summary judgment by definition does not resolve factual issues, a challenge to summary judgment presents for review only questions of law. [The Court reviews] those conclusions for correctness, according no particular deference to

the trial court." Transamerica Cash Reserve, Inc. v. Dixie Power & Water, Inc., 789 P.2d 24, 25 (Utah 1990).

STATEMENT OF THE CASE

A. Nature Of The Case.

This is a declaratory judgment action to determine coverage under two insurance policies, one issued by Liberty and one issued by Allstate.

B. The Course Of Proceedings.

On January 20, 1989, Allstate filed its Complaint. R. 2-6. The Complaint named Liberty and Travelers Insurance Co. Subsequently, Allstate voluntarily dismissed its claim against Travelers Insurance Co. R. 134-37. From January 20, 1989 to August 6, 1990, certain discovery was conducted. On August 6, 1990, Liberty filed a Motion for Summary Judgment. R. 31-32. Subsequently, Liberty and Allstate informally agreed to postpone further briefing of the motion so Allstate could conduct additional discovery. Further discovery was conducted and on June 7, 1991, Allstate filed its written opposition to Liberty's motion, a Cross-Motion for Summary Judgment and a motion to strike limited portions of two affidavits supporting Liberty's motion. R. 82-131.

C. Disposition In The Court Below.

On May 11, 1992, argument on the motions for summary judgment was heard by the Third District Court, the Honorable John A. Rokich presiding. R. 177. On June 18, 1992, the trial court entered an Order granting Liberty's Motion for Summary

Judgment, denying Allstate's Cross-Motion for Summary Judgment and granting Allstate's motion to strike. R. 182-84. Allstate appeals only the trial court's Order granting Liberty's motion and denying Allstate's cross-motion.

STATEMENT OF FACTS

On April 4, 1985, an automobile accident occurred involving two vehicles: a 1982 Buick Regal (the "Buick") driven by Lori Habish and another driven by Amie Przybyla. R. 3. Lori Habish did not own the Buick, but was driving it with her father's permission. R. 86. Amie Przybyla sustained serious injuries and sued Lori Habish and her father, Jack Habish ("Habish"), in the Third District Court for recovery of her damages. Przybyla v. Lori Habish, et. al., Civil No. C86 4893. R. 3. Allstate insured Habish and settled the claim for $100,000. R. 3-4. Allstate brought this action to recover the $100,000 from Liberty. R. 2-6.

Jockey International, Inc. ("Jockey") employs several salespersons. To assist its salespersons in their employment, Jockey leases vehicles for their use. R. 42, 249, 581. Jockey leases the vehicles from Wheels, Inc. ("Wheels"). R. 42, 80, 249. Jockey has been leasing vehicles from Wheels since at least November 24, 1971 pursuant to a written lease[1]. R. 80, 101-04. During the leasehold term, the vehicles were owned and titled in the name of Wheels. R. 42, 80. Jockey never acquired an

[1]The lease was originally entered into between Wheels, Inc. and Jockey's predecessor, Cooper's, Inc. R. 495-96.

ownership interest in the vehicles. Id. In 1985, Liberty insured the vehicles leased by Jockey. R. 42. Liberty's policy covered the vehicles only during the term of the lease. Id. Allstate insured Wheels in 1985. R. 178, 249.

The vehicles leased by Jockey vary in age and are replaced periodically at differing times. Since 1971, a practice has developed by which Jockey's employees may purchase from Wheels an old leased vehicle when a new replacement vehicle is provided. R. 42, 574, 583-84. A replacement vehicle is delivered to a local dealership and picked up by the respective Jockey employee. R. 252, 317. The replacement vehicle is used by Jockey's employee for Jockey's business. R. 252. If the employee does not intend to purchase the old leased vehicle, it is left at the local dealership for return to Wheels. R. 252, 318, 537, 539, 611-12. If Jockey's employee intends to purchase the old leased vehicle, it is retained by the employee for his personal use. R. 252-53.

Jockey employed Habish from approximately 1963 to 1986. R. 389-90. In October 1981, Wheels leased the Buick to Jockey. R. 80. Sometime prior to 1985, the Buick was delivered to Habish. R. 43, 390. From October 1981 to sometime after April 4, 1985, Wheels owned legal title to the Buick. R. 42, 81. Jockey never acquired an ownership interest in the Buick. Id.

In or before February 1985, Jockey notified Habish it would lease and provide him with a new vehicle to replace the Buick and Habish notified Jockey he wanted to purchase the Buick

from Wheels. R. 400-02. On March 11, 1985, a 1985 Mercury Marquis (the "Mercury") was delivered to Habish for his use as a salesman for Jockey, to replace the Buick. R. 43, 81. Habish retained possession of the Buick, but did not use the Buick in his employment with Jockey after March 11, 1985. R. 447, 449-50. From March 11, 1985 to April 4, 1985, the Buick was used only for the Habish's personal use. R. 414-16, 447, 449-50. At all times after March 11, 1985, Habish used only the Mercury in his employment with Jockey. R. 400-01, 447, 449-50.

Paragraph 2 of the lease between Jockey and Wheels states in pertinent part:

> Lessee's Payments. Lessee agrees to pay to the Lessor, the full monthly rental for the month in which the vehicle is delivered if delivery is accomplished on or before the 15th day of the month, and in advance for each month for each motor vehicle delivered under the within lease. No billing will be made for the month of delivery in the event the vehicle is delivered after the 15th of that month. If the lease of a vehicle is terminated on or before the 15th of the month, no charge will be made for that month, however, if the lease of the vehicles is terminated after the 15th of the month, a full month will be billed for the month of termination.

R. 101. Paragraph 12 states in pertinent part: "For billing purposes, the effective date of termination of a lease of a motor vehicle, shall be the delivery date of a replacement vehicle . . . ." R. 102. Thus, pursuant to those terms, the lease on the Buick terminated for billing purposes on March 11, 1985. Because the Mercury had been delivered on March 11, 1985, Wheels billed Jockey on the Mercury for the entire month of March and

thereafter. R. 328, 602. Wheels did not require payment on the Buick after February 1985. R. 327-28, 598-601.

The terms for the purchase of the Buick were established when the Mercury was delivered on March 11, 1985. On March 23, 1985, Habish obtained funds to purchase the Buick in full. R. 419. On about that same day, he tendered the funds to Wheels by mail to purchase the Buick. Id. After tendering the funds to Wheels, Habish believed the Buick was his own vehicle and understood he needed to obtain personal insurance coverage on the Buick. R. 414, 430, 447-48. Thus, on March 28, 1985, he obtained an oral binder of personal insurance coverage from Allstate on the Buick which became effective on March 29, 1985, six days before the accident. R. 140-41, 397-98. Wheels received Habish's funds on March 29, 1985. R. 81. At the time of the accident, Wheels and Habish were waiting for the new Certificate of Title to be issued. R. 3, 81. The new Certificate transferred legal title from Wheels to Habish, but only after the accident. R. 86.

SUMMARY OF ARGUMENT

This is a declaratory judgment action to determine insurance coverage between Liberty and Allstate. Based on the undisputed facts, the trial court concluded Liberty's insured did not possess an insurable interest in the Buick on the date of loss. Thus, the trial court determined Allstate was solely responsible to provide coverage, not Liberty. The trial court's decision was correct and should be affirmed.

To enforce an insurance contract, the named insured must possess an insurable interest when the policy is issued and when a loss occurs. Kingston v. Great Southwest Fire Ins. Co., 578 P.2d 1278, 1279-80 (Utah 1978); American Mutual Fire Insurance Co. v. Passmore, 275 S.C. 618, 274 S.E.2d 416, 417 (S.C. 1981). Jockey did not possess an insurable interest in the Buick on April 4, 1985, the date of the accident. Although Jockey previously possessed a leasehold interest, the lease terminated on March 11, 1985. Jockey never possessed legal title. Jockey never had physical possession of the Buick and relinquished legal control on March 11, 1985. Jockey had no potential legal liability to Amie Przybyla for Lori Habish's operation of the Buick. Thus, Liberty is not responsible for Przybyla's losses.

Allstate's insureds, Wheels and Habish, possessed an insurable interest in the Buick on April 4, 1985. Wheels possessed legal title and Habish possessed equitable title. Habish had physical possession of the Buick. As the legal title holder, Wheels had legal control and Habish had physical control. Wheels gave Habish permission to use the Buick at his discretion. Habish gave Lori Habish permission to drive the Buick. Wheels and Habish possessed potential legal liability to Amie Przybyla for Lori Habish's operation of the Buick. Thus, Allstate is solely responsible for Przybyla's losses.

ARGUMENT

POINT I

JOCKEY DID NOT POSSESS AN INSURABLE INTEREST

This is an action to determine the insurance coverage responsibilities between Allstate and Liberty. Allstate focuses solely on "ownership." Allstate argues its insured, Habish, did not possess "legal title" to the Buick, so it should not be responsible for the loss. Appellant's Brief, at 6-8. Allstate completely ignores that legal title was possessed by its other insured, Wheels. Allstate then argues Jockey has "ownership responsibilities" under its lease with Wheels and therefore Jockey's insurer, Liberty, must pay the loss. Id. at 8-15. "Ownership" is not the issue.

To insure the Buick, Jockey had to possess an insurable interest in it. Kingston v. Great Southwest Fire Ins. Co., 578 P.2d 1278, 1279-80 (Utah 1978); Hill v. Safeco Ins. Co., 22 Utah 2d 96, 448 P.2d 915, 916 (1969). "[O]ne who has no interest in property cannot insure it." National Farmers Union Property and Casualty Co. v. Thompson, 4 Utah 2d 7, 286 P.2d 249, 252 (1955). Automobile liability insurance must also be supported by an insurable interest. American Mutual Fire Insurance Co. v. Passmore, 275 S.C. 618, 274 S.E.2d 416, 417 (1981). See also, Bendall v. Home Indemnity Co., 286 Ala. 146, 150, 238 So.2d 177, 180 (1970); 3 Couch, Cyclopedia of Insurance Law, § 24:160, at 261 (2d ed. 1984). An insurable interest must exist when the insurance policy is issued and when a loss occurs. Kingston, 578

P.2d at 1279. The Utah Supreme Court defined "insurable interest" in Hill: "'Generally speaking, a person has an insurable interest in property whenever he would profit by or gain some advantage by its continued existence and suffer some loss or disadvantage by its destruction. . . .'" 448 P.2d at 916, n. 2 (quoting Couch on Insurance, 2d, Sec. 24.13 (Anderson 1960)). The Utah Supreme Court has also defined what does not constitute an insurable interest.

> We agree that such an interest would not exist if it were based solely upon an agreement that an owner (such as Hardy) would permit another (such as Thompson) to insure the owner's (Hardy's) property for the benefit of the latter (Thompson) unless the latter had some interest in the property other than the right to recover if it were destroyed by fire. Such an agreement would permit one having no interest in the property except a potential gain from its destruction to gamble upon its loss and would be against public policy. It is unquestionably true that the party insuring must have some interest beyond this.

Thompson, 286 P.2d at 252. The dispositive issue then is who had an insurable interest in the Buick on April 4, 1985.

A. Jockey Did Not Possess A Leasehold Interest.

Allstate's sole contention is that Wheels' lease imposed "ownership responsibilities" on Jockey which included the duty to insure the Buick. Appellant's Brief, at 8-10. Allstate admits Liberty has no liability if the lease terminated before the accident. Id. at 8-9. The pivotal issue then is when did the lease on the Buick terminate. Based on the undisputed facts, the trial court drew the legal conclusion that "the date that Jockey surrendered the vehicle to Habish for purchase from Wheels Inc. is the date the lease terminated." R. 179. Allstate is not

challenging any of the undisputed facts, only the trial court's legal conclusion.[2] Allstate contends the trial court should have concluded the lease remained in effect until legal title passed from Wheels to Habish after April 4, 1985. Appellant's Brief, at 8-10.

Allstate contends when the lease terminated is a legal question because the lease between Wheels and Jockey is unambiguous. Id. at 9. Liberty agrees the question of termination is one of law, but not only because the lease is unambiguous. Liberty agrees the lease is not ambiguous, but it does not define when termination occurs. While some of the lease's terms are helpful, the lease does not completely answer the question.

The trial court's determination that the lease terminated when Jockey surrendered the Buick to Habish for purchase from Wheels is a legal conclusion.

> If a determination concerns whether the evidence showed that something occurred or existed, it is properly labeled a finding of fact, but if a determination is made by a process of legal reasoning from, or of interpretation of the legal significance of, the evidentiary facts, it is a conclusion of law.

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[2] In oral argument before the trial court, Allstate conceded "the only testimony that we're going to get in this case is already in the depositions." R. 265. Without specifying any factual disputes, Allstate also conceded that any alleged dispute would not preclude the trial court from deciding the legal issues in the case. R. 266-67. Allstate then declined the opportunity to have an evidentiary hearing and agreed to have the trial court resolve the matter based on the facts as stated by Liberty. R. 266-68. In its appeal brief, Allstate has not challenged any of Liberty's facts. In fact, Allstate often relies on the statement of facts in Liberty's original memorandum in support of its motion for summary judgment. Appellant's Brief, at 2-3.

Moulden & Sons, Inc. v. Osaka Landscaping & Nursery, Inc., 21 Wash. App. 194, 584 P.2d 968, 970 n. 5 (1978)(citation omitted). The trial court's determination was drawn from its interpretation of the legal significance of the undisputed evidentiary facts. Thus, it is a legal conclusion. When the material facts are undisputed, the determination of their legal effect is a question of law. See e.g., DeMontiney v. Desert Manor Convalescent Center, Inc., 144 Ariz. 21, 695 P.2d 270, 273-74 (Ariz. Ct. App. 1984)("While the question of whether an employment relationship is one of master and servant or principal and independent contractor is generally one of fact for the jury . . . where the evidence is clear and uncontradicted the question is one of law and should be decided by the court."); United States Leasing Corp. v. duPont, 70 Cal. Rptr. 393, 444 P.2d 65, 75 (Cal. 1968)("where, as here, the existence of liability depends upon the interpretation of written instruments in the light of uncontradicted extrinsic evidence, the question is properly one of law . . . ."); Evans v. Bredow, 95 Ga. App. 488, 98 S.E.2d 115, 117 (1957)("In view of the uncontradicted evidence the question of title became one of law for the court to determine."). Thus, this Court must determine if the legal conclusion drawn by the trial court from the undisputed facts was correct.

Allstate contends the language of the lease requires a different conclusion by the trial court. Allstate relies on six paragraphs in the lease: ¶¶ 1, 4, 5, 11, 12 and 2. Id. at 9-10.

Paragraphs 1 and 4 give Jockey the right to possess a leased vehicle "during the term of the lease," but do not define the "term of the lease." Paragraphs 5 and 11 provide that Jockey will perform repairs and maintain liability insurance on a leased vehicle "during the term of the lease," but do not define the "term of the lease." Paragraph 12 provides that Jockey will return leased vehicles upon termination of the lease, but does not define when the lease terminates. Paragraph 12 also provides the lease terminates for billing purposes when a replacement vehicle is delivered, but does not specify when termination occurs for other purposes. Paragraph 2 outlines an administrative billing procedure, but does not define termination of the lease for all purposes. None of those paragraphs directly address this case. Nor do any other provisions in the lease.

Allstate ignores the business practice which developed between Wheels and Jockey outside the lease. Periodically and at differing times, Jockey replaces the vehicles issued to its employees. A replacement vehicle is delivered to a local dealership and picked up by the respective Jockey employee. R. 252, 317. The replacement vehicle is used by Jockey's employee for Jockey's business. R. 252. If the employee does not intend to purchase the old leased vehicle, it is left at the local dealership for Wheels. R. 252, 318, 537, 539, 611-12. If Jockey's employee intends to purchase the old leased vehicle, it is retained by the employee for his personal use. R. 252-53. The lease does not address that practice or Wheels' and Jockey's

respective insurance responsibilities between the time when the employee receives the replacement vehicle and assumes control of the replaced vehicle and when the purchase of the replaced vehicle is completed and legal title passes from Wheels to the employee.

The trial court's conclusion is supported by the undisputed material facts. They are: The replacement vehicle, the Mercury, was delivered to and received by Habish on March 11, 1985. R. 43, 81. After that date, Habish used only the Mercury for Jockey business. R. 400-01, 447, 449-50. After March 11, 1985, Habish retained the Buick only for personal use. R. 414-16, 447, 449-50. Habish considered the Buick his when he sent the purchase funds to Wheels on about March 23, 1985. R. 414. Prior to the accident, Habish understood he needed to obtain personal insurance coverage. R. 430, 447-48. Habish did not permit the Buick to be driven until after he had obtained personal insurance coverage. R. 397, 449-50. Habish obtained personal insurance coverage from Allstate which became effective on March 29, 1985, six days prior to the accident. R. 140-41, 397-98. The lease on the Mercury began on March 11, 1985, when it was delivered to Habish, not when legal title to the Buick was transferred to Habish.

The most enlightening indication of when the lease terminated is found in the billing treatment given by Wheels to the Buick. Pursuant to paragraph 12 of the lease, the lease on

the Buick terminated for billing purposes on March 11, 1985[3]. Pursuant to paragraph 2 of the lease, Wheels billed Jockey on the Mercury for the entire month of March and thereafter because the Mercury had been delivered on March 11, 1985. R. 328, 602. Wheels did not require any further lease payments on the Buick after February 28, 1985. R. 327-28, 598-601. If the lease had not terminated, Wheels would have required payment on the Buick from Jockey for March and April 1985. Because the lease terminated before the accident, Jockey's insurable leasehold interest in the Buick also expired.

B. Jockey Did Not Possess Any Other Insurable Interest.

1. Jockey did not possess any ownership interest.--It is undisputed that Jockey did not possess any ownership interest in the Buick at any time. Jerold L. Mullane ("Mullane"), the Director of Corporate Risk Management/Insurance for Jockey, and Ford G. Pearson ("Pearson"), Executive Vice President of Wheels, testified that Jockey never acquired any ownership interest in any of the vehicles leased by Jockey from Wheels, including the Buick. R. 41-43, 79-81. Allstate admitted in its complaint, in oral argument and most recently, in its brief that Jockey did not own the Buick on April 4, 1985. R. 3, 263; Appellant's Brief, at 2-3.

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[3]Allstate contends Liberty relies on paragraph 12 to establish the lease terminated on March 11, 1985 for **all** purposes. Appellant's Brief, at 11. Allstate uses 3 and 1/2 pages quoting excerpts from Mullane's deposition to show that Liberty's alleged position is incorrect. Id. at 12-15. Liberty has never asserted that paragraph 12 controls termination for all purposes. That paragraph and the other undisputed facts, merely support the conclusion drawn by the trial court.

2. Jockey did not have possession or control.--It is undisputed that Jockey never had physical possession of the Buick. Jockey leased the Buick for Habish's use. R. 80. The Buick was delivered to Habish. R. 43, 390. Habish used the Buick in his employment with Jockey, but retained physical possession at all times from October 1981 to at least April 4, 1985. R. 383-489.

Jockey had legal control over the Buick from 1981 to March 11, 1985, but relinquished control on that date. Jockey leased the Mercury to replace the Buick. R. 43, 81. On March 11, 1985, the Mercury was delivered to Habish to be used in his employment. Id. Because of Habish's expressed interest in purchasing the Buick, he retained physical possession of and assumed all control over it for his personal use. At that time, Jockey relinquished all control over the Buick. Habish was free to use the Buick as he pleased. R. 130-31. Lori Habish was driving the Buick on April 4, 1985 pursuant to her father's permission. R. 86. Jockey could not compel Habish to return it, limit his use of it or direct its disposition.

3. Jockey had no risk of legal liability to third parties.--The insurable interest required to enforce an automobile liability policy is different than the interest required to enforce policies involving property loss. Bendall, 238 So.2d at 180. Automobile liability policies protect the insured against legal liability for injuries to third parties caused by the ownership or use of the covered automobile. Id. at

181. Thus, the courts addressing this issue generally hold the existence of an insurable interest turns on whether the insured may be liable for damages sustained by third parties because of the automobile's use. See e.g., Passmore, 274 S.E.2d at 417-18; Rea v. Hardware Mutual Casualty Co., 15 N.C. App. 620, 190 S.E.2d 708, 713 (1972). One court characterized the requisite interest as whether "the 'assured' has such abiding interest in the use of the car in his business that he may become legally liable to others for injuries resulting from its operation . . . ." Id. (quoting Ocean Accident & Guarantee Corp. v. Bear, 125 So. 676, 679 (Ala. 1929). If not, there is no insurable interest. See e.g., Bendall, 238 So.2d 177; Employers Liability Assurance Corp. v. Swett, 95 N.H. 31, 57 A.2d 157 (1948); Passmore, 274 S.E.2d 416.

In determining an insured's potential liability, the courts have focused primarily on the named insured's control over or right to control the use of the automobile. See e.g., Bendall, 238 So.2d 177; Swett, 57 A.2d 157; Passmore, 274 S.E.2d 416. In Bendall, Swett and Passmore, the courts each held the named insured had to possess an insurable interest in an automobile liability policy. 238 So.2d at 180; 57 A.2d at 160; 274 S.E.2d at 417. Each held or relied on prior case law that held the requisite insurable interest depends on the named insured's potential legal liability to third parties for damages sustained from the use of an automobile allegedly covered by the liability policy. 238 So.2d at 181; 57 A.2d at 160; 274 S.E.2d

at 417-18. Each found no potential legal liability because the named insured had no control over the use of the vehicle. 238 So.2d at 179-82; 57 A.2d at 157, 159; 274 S.E.2d at 417-18. Each held no insurable interest existed. 238 So.2d at 181-82; 57 A.2d at 160; 274 S.E.2d at 418.

Galati v. New Amsterdam Casualty Co., 381 S.W.2d 5, (Mo. Ct. App. 1964) is the closest case factually on point to this case. In Galati, Sam Galati leased a Chevrolet vehicle from Manchester Lend-Lease Co. Manchester retained legal title during the leasehold term. Id. at 6. The lease granted Galati an option to purchase the Chevrolet at any time. The lease required Galati to obtain collision coverage which he did. The policy named Galati and Manchester. A few months later, Galati's aunt, Mrs. Deblasi, expressed her interest in purchasing the Chevrolet from Manchester. Galati and Deblasi went to Manchester and told Manchester Deblasi was purchasing the vehicle. Id. Deblasi paid the purchase price in full, signed some documents and was told by Manchester she would eventually receive the certificate of title. Id. at 6-7. Then, Galati drove Deblasi home, gave her his only set of keys and Deblasi took possession of the Chevrolet. Id. at 7. At that time, Galati considered the Chevrolet Deblasi's car. Two days later, Deblasi was involved in an accident. Deblasi received the certificate of title approximately two weeks later. Galati's policy was never assigned to Deblasi.

Galati sought to enforce the collision policy against his insurer. The lower court ruled in Galati's favor and the St.

Louis Court of Appeals reversed. The court of appeals held an "insured must have an interest of some kind in the subject matter of the insurance. . . . [O]therwise the contract would become a gambling contract and void." Id. at 9 (citation omitted). The court further held that once "the insured parts with his interest in the insured property he stands as though he had never had any right in it, and from that moment forward his policy is void as a mere wagering contract." Id. The court found Galati had two interests under the lease: the right to possession and use of the car and the right to purchase it. The transfer of those rights was complete two days before the accident. Despite Manchester's failure to deliver the certificate of title before the accident, Deblasi had "acquired all the rights [Galati] had. There was no way thereafter that he could '* * * suffer a loss from its destruction. * * *'" Galati "was no longer '* * * exposed to the danger of the loss against which he was indemnified * * *.'" Id.

Although Galati did not involve a liability policy, its facts would have also compelled the Missouri court to find no insurable interest in that context. Missouri follows the general rule that to enforce a liability policy the named insured must have an insurable interest. Hall v. Weston, 323 S.W.2d 673, 679-80 (Mo. 1959). Missouri also follows the general rule that an insurable interest exists if the insured is legally liable to third parties injured because of the vehicle's operation. Pennsylvania National Mutual Casualty Insurance Co. v. State Farm Mutual Automobile Insurance Co., 605 S.W.2d 125, 127 (Mo. 1980).

At the time of the accident, Manchester still possessed title to the Chevrolet. Deblasi had paid Manchester in full for the Chevrolet. Galati transferred possession of and control over the Chevrolet to Deblasi for her personal use. Galati considered it to be Deblasi's. Galati had transferred and Deblasi had obtained "all the rights [Galati] had" before the accident. Galati would have had no legal liability to any third parties injured because of Deblasi's operation of the Chevrolet.

This case is factually identical to Galati. Wheels possessed legal title. R. 42, 81. Habish had paid Wheels in full for the Buick. R. 81, 419. Jockey transferred possession and all control to Habish before the accident for his personal use. Habish considered the Buick his and understood he needed personal insurance. R. 414, 430, 447-48. After March 11, 1985, not only did Habish not use the Buick in his employment, but also he did not permit its use for any purpose until he had obtained personal insurance coverage. R. 397, 449-50. Habish did not need Jockey's permission to use the car. In fact Jockey, did not have power to give or withhold permission. Rea, 190 S.E.2d at 713. Lori Habish was operating the Buick for her personal use and by her father's permission. R. 86. Thus, Jockey had no legal liability to Przybyla and therefore no insurable interest in the liability policy.

POINT II

WHEELS AND HABISH HAD AN INSURABLE INTEREST

A. Allstate's Insureds Had An Ownership Interest.

It is undisputed that Allstate's insured, Wheels, possessed legal title to the Buick at all times before and on April 4, 1985. Mullane and Pearson testified Wheels possessed legal title to the Buick before and on April 4, 1985. R. 41-43, 79-81. Allstate has never disputed that testimony. In fact, Allstate admits in its Statement of Facts that Wheels possessed legal title until sometime after April 4, 1985. Appellant's Brief, at 2-3.

Although Allstate's other insured, Habish, did not obtain legal title until after the accident, he possessed equitable title to the Buick on April 4, 1985. In February 1985, Habish expressed his desire to purchase the Buick. R. 400-02. By approximately March 23, 1985, Habish acquired and sent to Wheels the funds to purchase the Buick. R. 419. Wheels received the funds by March 29, 1985. R. 81. By April 4, 1985, Habish had completed all the terms of the purchase and Wheels and Habish were merely waiting for Utah to issue a new certificate of title. R. 3, 81, 86. Thus, equitable title had passed to Habish.

The transfer of equitable title despite the failure to effectuate the transfer of a new certificate of title was recognized by the Utah Supreme Court in Dahl v. Prince, 119 Utah 556, 230 P.2d 328 (1951). In Dahl, a Buick was registered in the name of Garn. Id. at 329. The Garns purchased a truck from Dahl

and traded the Buick to Dahl as part payment for the truck. Dahl did not obtain a new certificate of title. Subsequently, the Garns' creditor, C. G. Green, obtained a writ of attachment and had the writ levied on the Buick. Green argued he was entitled to the Buick because Dahl had not effected transfer of title. Id. Green relied on Utah Code Ann. § 57-3a-72 (1943)[4]. Id. at 330. The Utah Supreme Court stated section 57-3a-72 governed the transfer of legal title only and not equitable title. The Court further stated the statute implied equitable title transferred to a bona fide purchaser. Id. The Court held the purchase between the Garns and Dahl was complete and equitable title had passed. Id. at 330-31. The transfer of equitable title has been recognized by the Utah Supreme Court in other cases. See Hall v. Fitzgerald, 671 P.2d 224 (Utah 1983)("In a uniform real estate contract . . . the vendor usually retains legal title and passes equitable title to the purchaser." Id. at 227); First Security Bank of Utah, N. A. v. Hall, 29 Utah 2d 24, 504 P.2d 995 (1972)(The recipient of a stock gift obtains equitable title notwithstanding the donor's failure to endorse the stock certificates. Id. at 996); Mosby Irrigation Co. v. Criddle, 11 Utah 2d 41, 354 P.2d 848 (1960)(Notice to the owner of equitable title to application for appropriation of water was proper. Id. at 851-52).

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[4]Section 57-3a-72 is the predecessor to section 41-1-72. Allstate relies on section 41-1-72.

B. Allstate's Insureds Had Possession And Control.

It is undisputed that Habish physically possessed the Buick from 1981 to at least April 4, 1985. It cannot be disputed that Habish exercised control over the Buick from March 11, 1985 to April 4, 1985. Habish retained possession of the Buick after March 11, 1985 for his personal use. He drove only the Mercury for his employment. He did not permit anyone to drive the Buick until he had obtained personal insurance coverage. Once insured on March 29, 1985, Habish gave permission to his daughter to drive the Buick. Habish had a right to direct the Buick's disposition. Furthermore, it cannot be disputed that Wheels had some right to control the Buick from March 11, 1985 to April 4, 1985. Transfer of legal title had not been completed. If Habish had failed to meet any of the terms of the purchase, Wheels would have been entitled to demand return of the Buick.

C. Only Allstate's Insureds Had An Insurable Interest.

Based on Hill's definition of an "insurable interest," only Habish and Wheels had an insurable interest on April 4, 1985. Jockey's interest in the Buick ceased on March 11, 1985. Wheels delivered the Mercury to Habish as a replacement for the Buick. Habish retained possession of the Buick for his personal use. The Buick was no longer available to Jockey for its use or the use of its employees. Habish's responsibilities to Jockey were no longer dependent on his use of the Buick. Habish possessed the Mercury to perform his job responsibilities. Jockey no longer controlled the Buick's disposition. Jockey

could not profit by or gain any advantage by the Buick's continued existence. Jockey could not suffer any loss or disadvantage by its destruction. If the Buick had been stolen, damaged or destroyed, Jockey's business interests would not have been affected. Jockey could not have claimed a taxable loss or recover any insurance proceeds.

Wheels and Habish, however, stood to gain from the vehicle's continued existence and risked a loss by its destruction. "'Any interest in property, **legal or equitable**, qualified, conditional, contingent, or absolute, or merely the right to use the property, with or without the payment of rent, is sufficient.'" Hill, 448 P.2d at 916, n. 2 (emphasis added). Other courts have held equitable title is a sufficient insurable interest. See e.g., Cherry v. Cherry, 343 P.2d 1066, 1068 (Okla. 1959); Snodgrass v. State Farm Mutual Automobile Insurance Co., 15 Kan. App. 2d 153, 804 P.2d 1012, 1017-18 (1991). The Oklahoma Supreme Court stated:

> 'As soon as any interest in property vests in the vendee, he has an insurable interest therein, as in the case of a vendee under an executory contract of purchase which operates to vest in him an equitable title to the property. . . . It is not material that the legal title to the property has not passed to the vendee, who has paid part of the purchase price; and the insurable interest of the vendee is not defeated by the fact that the contract of purchase is unenforceable under the statute of frauds, * * * The destruction of property is a real loss to the person in possession, who claims title under an executory contract of purchase, and neither the fact that he owes the purchase money nor the contingency that his title may be defeated by his inability subsequently to perform the conditions of his contract defeats the existence of an insurable interest in him. * * *'

Cherry, 343 P.2d at 1069 (citation omitted). Habish had equitable title and his insurer was responsible. Because Wheels' legal title had not transferred to Habish, Wheels' insurer was responsible for the loss too. State Farm Mutual Insurance Company v. Holt, 28 Utah 2d 426, 503 P.2d 1205 (1972). In addition, to the extent Habish defaulted on the purchase, Wheels also controlled disposition of the vehicle. Wheels had an interest in preserving the Buick's value until legal title was transferred in case it had to retrieve the vehicle.

Finally, Wheels and Habish were exposed to legal liability to Przybyla. Because Wheels owned legal title, Habish was using the Buick pursuant to Wheels' permission. Only the legal title holder or someone with the right to possess and control the vehicle can give permission. Rea, 190 S.E.2d at 713. Habish controlled the use of the Buick and gave Lori Habish permission to use it for her personal use. Both then faced potential legal liability for Lori Habish's operation of the vehicle. Allstate covered both. Only Allstate was responsible for Przybyla's damages.

POINT III

HABISH CANNOT NOT ENFORCE WHEELS' LEASE AGAINST JOCKEY

Assuming arguendo the lease between Wheels and Jockey did not terminate before the accident, it cannot serve as a basis for compelling enforcement of Liberty's policy. Allstate's sole argument is that Jockey had a contractual obligation to insure the Buick until legal title passed to Habish. Appellant's Brief,

at 8-10. That alleged contractual obligation arises from the lease. Habish is not a party to the lease. Wheels is not a party to the action. There is no claim or evidence that Wheels' rights under the lease were assigned to Habish. Any contractual obligation to insure the Buick was owed to Wheels and Habish has no standing to enforce it.

POINT IV

ALLSTATE'S RELIANCE ON HOLT IS MISPLACED

Allstate's reliance on State Farm Mutual Insurance Company v. Holt, 28 Utah 2d 426, 503 P.2d 1205 (1972) is misplaced. In Holt, Yazzie was purchasing a vehicle from his employer who possessed legal title to the vehicle. Yazzie's employer, Holt, retained legal title to the vehicle pending full payment by Yazzie. Before full payment was made and, therefore, before legal title was transferred from Holt to Yazzie, the vehicle was involved in an accident. The Supreme Court held that because Holt possessed an insurable interest at the time of the accident, as the legal title holder, Holt's insurer was liable.

Holt does not require Liberty to pay. At all times prior to the accident, Wheels possessed legal title to the Buick. Prior to the accident, Habish had paid Wheels in full to purchase the Buick and was waiting to have legal title transferred from Wheels to Habish. On the date of the accident, legal title remained in Wheels and Habish possessed equitable title. Thus, Holt requires Allstate to pay as either Wheels' insurer or Habish's insurer, but not Liberty.

POINT V

UTAH LAW DID NOT REQUIRE JOCKEY TO INSURE THE BUICK

Allstate contends that Utah law required Jockey to insure the Buick until legal title transferred. Appellant's Brief, at 10-11. Allstate further contends it is illegal for Jockey to operate the Buick without liability insurance. Id. From March 11, 1985 to April 4, 1985, Jockey was not operating the Buick. The Buick was controlled by Habish and operated by Habish or his daughter only for their personal use and only after he had obtained personal liaility coverage from Allstate on March 29, 1985. Any duty to insure arising out of ownership in the Buick belongs to either Wheels as the legal title owner or Habish as the equitable owner, but not Jockey.

CONCLUSION

Absent an insurable interest in the Buick, Jockey cannot insure it. Although Jockey previously possessed an insurable interest, Jockey relinquished any interest it had on March 11, 1985. Thus, on April 4, 1985, the date of the accident, Jockey did not possess any insurable interest in the Buick. However, Allstate's insureds, Wheels and Habish, did. The trial court's Order granting Liberty's motion for summary judgment and denying Allstate relief was correct. Thus, Liberty requests that this Court affirm the trial court's decision.

DATED: December 1, 1992.

MOYLE & DRAPER, P.C.

By _____
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Jeffrey Robinson
Attorneys for Liberty Mutual
Insurance Group

CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of December, 1992, four copies of the Brief of Appellee were mailed to the following:

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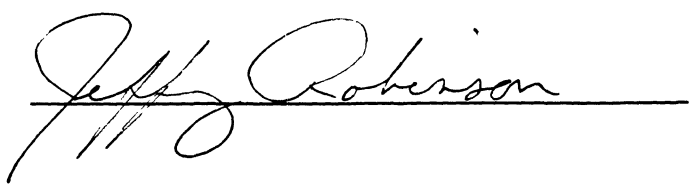

Tab A

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

ALLSTATE INSURANCE COMPANY,	:	MEMORANDUM DECISION
Plaintiff,	:	CIVIL NO. 890900412
vs.	:	
LIBERTY MUTUAL INSURANCE GROUP, and TRAVELERS INSURANCE COMPANY,	:	
Defendants.	:	

The Court heard the Summary Judgment Motion of defendant Liberty Mutual Insurance Group and plaintiff's cross Motion for Summary Judgment on May 11, 1992. The Court heard oral argument and read the Memoranda filed herein. The Court now enters its ruling.

The undisputed facts are:

1. Allstate was Wheels Inc. insurer.

2. Wheels Inc. was the titled owner of the Buick automobile leased to Jockey.

3. Jockey's employees used the leased vehicles.

4. Jack Habish was an employee of Jockey.

5. Mr. Habish made arrangements to purchase the Buick automobile furnished to him by Jockey from Wheels Inc., the title holder.

6. Jockey surrendered the Buick to Mr. Habish so that he could purchase the Buick from Wheels Inc.

7. Habish negotiated the purchase of the Buick from Wheels Inc. and caused the vehicle to be covered by his insurance policy.

8. Prior to the time that Wheels Inc. caused title to be transferred to Habish, Habish's daughter, while driving the vehicle, was involved in an accident.

9. As a result of the accident, Allstate satisfied a claim against Habish's daughter for $100,000.00.

10. Jockey, as a lessee, maintained insurance coverage on the vehicles leased from Wheels Inc.

The issue presented to the Court was whether or not the Buick was covered by Jockey's insurance carrier, Liberty, until such time as title was transferred to Habish.

The Court concluded that the date that Jockey surrendered the vehicle to Habish for purchase from Wheels Inc. is the date the lease terminated. When Wheels Inc. agreed to sell the vehicle to Habish, which was before the date of the accident, Wheels Inc. and Habish were responsible for insurance coverage on the Buick.

The critical issue in this case is the date of surrender of the Buick for sale and not the transfer of title. Jockey was required to maintain insurance only for so long as it had a leasehold interest in the vehicle. Once Jockey gave up the leasehold interest by surrendering the Buick for sale by the lessor, its obligation for insurance coverage terminated. Transfer of title effected only the relationship between Habish and Wheels, Inc.

Plaintiff's Motion to partially strike the Affidavits of Jerald L. Mullane and Ford G. Pearson is granted.

The Motion of defendant Liberty Mutual Insurance Group for Summary Judgment is granted and plaintiff's Motion for Summary Judgment is denied.

Dated this 26 day of May, 1992.

John A Rokich

JOHN A. ROKICH
DISTRICT COURT JUDGE

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Memorandum Decision, to the following, this 27 day of May, 1992:

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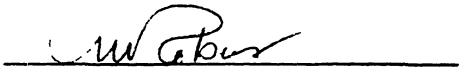

Tab B

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IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

ALLSTATE INSURANCE COMPANY, Plaintiff, v. LIBERTY MUTUAL INSURANCE GROUP and TRAVELERS INSURANCE COMPANY, Defendants.	:	ORDER Civil No. C-89-0900412 Judge John A. Rokich

Oral argument was heard on Liberty Mutual Insurance Group's Motion for Summary Judgment and Allstate Insurance Company's Cross-Motion for Summary Judgment and motion to partially strike the Affidavits of Jerold L. Mullane and Ford G. Pearson. After oral argument, the Court took the matter under advisement. On May 26, 1992, the Court issued a Memorandum Decision. Based on the parties' oral argument, the legal memoranda, the record on file, the Court's Memorandum Decision, and good cause appearing therefore,

IT IS ORDERED that:

1. Liberty Mutual Insurance Group's Motion for Summary Judgment is granted and plaintiff's Complaint against Liberty Mutual Insurance Group is dismissed with prejudice.

2. Allstate Insurance Company's Cross-Motion for Summary Judgment is denied.

3. Allstate Insurance Company's motion to partially strike the Affidavits of Jerold L. Mullane and Ford G. Pearson is granted.

DATED: June 18, 1992.

BY THE COURT:

John A Rokich

Honorable John A. Rokich
District Court Judge

CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of June, 1992, a copy of the Order was mailed to:

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